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ZAHIDA MOHAMED RAFIK v. NOOR AZMAN AZEMI

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
BADARIAH SAHAMID JCA
HASNAH MOHAMMED HASHIM JCA
B [CIVIL APPEAL NO: W-02(NCVC)(W)-393-03-2015]
16 MAY 2017

C ***TORT:*** *Defamation – Libel – Absolute privilege – Police report – Whether impugned words in article a regurgitation of police report – Whether doctrine of absolute privilege protects statements made in course of legal proceedings – Whether publication of article enjoyed protection of absolute privilege in ancillary manner – Whether defence of absolute privilege established*

D ***TORT:*** *Defamation – Libel – Defence of justification – Whether truth of all material statements in words complained of established – Whether statements made correct imputations or conclusions drawn from proved facts – Whether defence of justification established*

E On 29 February 2012, the defendant, an actress, handed the plaintiff, her personal driver, RM200,000 in cash and a cheque for the amount of RM120,000 to be banked in. At about 2pm on the same day, the defendant tried to contact the plaintiff but was unsuccessful. At about 3.45pm on the same day, the defendant contacted Maybank Jalan Ampang Branch to enquire whether the monies she had handed over to the plaintiff had been banked in as instructed. The bank officer informed the defendant that there
F was no transaction made in respect to her bank account that day. The defendant, together with her sister and brother-in-law, went to the plaintiff's house to look for the plaintiff and was told by the plaintiff's mother that he was not at home. At about 6.30pm the same day, the defendant lodged a police report against the plaintiff at the Ampang Jaya police headquarters, which stated that the plaintiff had run off with the defendant's money
G amounting to RM200,000. After making the police report, the defendant was approached by reporters who were waiting for her outside the police station. The reporters enquired the reason she went to the police station and she told them she had lodged a police report against the plaintiff and read the report to them. On 3 March 2012, *Harian Metro* published the article entitled
H "Zahida Rafik Terkedu" which was the subject matter of the defamation suit. The impugned words in the article that the plaintiff complained were defamatory of him were*, inter alia* (i) that the plaintiff had absconded with money amounting to RM200,000 leaving the defendant to suffer losses; (ii) that the plaintiff could not be contacted; (iii) that the case would be
I investigated under s. 406 of the Penal Code for criminal breach of trust; and

(iv) that the defendant had made a mistake for believing in the plaintiff. It was the plaintiff's pleaded case that the words used in their natural and ordinary meaning were defamatory and were meant to mean, amongst others, that the plaintiff was dishonest, a thief, untrustworthy, a criminal, a person who did not have a good reputation and a person with no morals. The plaintiff further contended that the impugned words in the article were false, unfounded and maliciously published and that it had tainted his reputation, character as well as affected his opportunity to get a new job. The defendant raised the defence of justification and ancillary privilege. It was the defendant's pleaded case that she had received cash of RM243,000 on 28 February 2012 from DW4 as commission due to her in respect of a business transaction between them. The defendant pleaded that the impugned words enjoyed ancillary privilege as it was a regurgitation of the police report which was protected by absolute privilege. The High Court Judge, however, was of the considered view that the plaintiff had proven that the impugned words in the article were defamatory and not protected by ancillary privilege. According to the High Court Judge, the defendant failed to prove the defence of justification and absolute privilege. Hence, the High Court allowed the plaintiff's claim and ordered the defendant to pay RM150,000 as general damages and costs. Thus, the defendant's appeal against the said decision. It was submitted by the defendant (i) that the impugned words complained of were not defamatory; (ii) that the contents of the police report made by the defendant was protected under absolute privilege; and (iii) that there was cogent and credible evidence that the defendant had entrusted the plaintiff with the RM200,000 in cash to be banked in.

Held (allowing appeal with costs)

Per Hasnah Mohammed Hashim JCA delivering the judgment of the court:

(1) It is trite that to establish the tort of defamation, the burden was on the plaintiff to prove that the impugned words were capable of bearing the defamatory meaning put forward, was referring to the plaintiff and was published by the defendant to a third person. The meaning must be gathered from the actual words used in the context of the article. Having examined the words used in the article, the trial judge was correct to have concluded that the words in its natural and ordinary meaning were defamatory and disparaged the plaintiff. The impugned words referred to the plaintiff and the article was published by *Harian Metro*. (paras 21, 25 & 26)

(2) The doctrine of absolute privilege protects statements made in the course of legal proceedings. No action in defamation could thus be brought against a witness, the parties. The impugned words in the article herein were in fact nothing more than a regurgitation of the words in the police report. The police report was republished in the impugned

article. The trial judge had erred when she concluded that the defence of absolute privilege was not available to the defendant. The publication of the alleged defamatory contents of the publication in the *Harian Metro* attracted the same privilege in an ancillary manner as that attaching to the police report and therefore this court was of the considered view that the publication of the impugned article in *Harian Metro* enjoyed the protection of absolute privilege in an ancillary manner. (paras 28-33)

(3) To succeed in the defence of justification, the defendant must establish the truth of all the material statements in the words complained. To justify such comments, it was necessary to show that the statements were the correct imputations or conclusions to be drawn from the proved facts. The defendant had adduced evidence of her source of income and explained in cross-examination her source of payment. The person who made the payment to the defendant was called as a witness. DW4 testified in court that he had issued the voucher to the defendant for payment. DW4 confirmed that he had made the cash payment of RM243,000 to the defendant. The defendant's father DW3 gave evidence that he witnessed the defendant receiving and counting the large sum of money on 28 February 2012. During cross-examination, the plaintiff himself readily admitted that the defendant definitely had more money than RM243,000. The trial judge failed to consider the veracity and credibility of the plaintiff as a witness, especially his conduct after he failed to return to work and his disappearance immediately after the alleged incident. (paras 34 & 35)

(4) Having considered the decision of the High Court in its entirety in light of the materials and submissions adduced, there was an appealable error that had been shown by the defendant that could properly justify an appellate intervention. The defendant had established on the balance of probabilities the truth of the statement in her police report that the plaintiff had run off with the monies which she entrusted him to bank into her account. The decision of the High Court was thus set aside. (paras 38 & 39)

Bahasa Malaysia *Headnotes*

Pada 29 Februari 2012, defendan, seorang pelakon wanita, telah menyerahkan kepada plaintif, pemandu peribadinya, wang berjumlah RM200,000 dan satu cek berjumlah RM120,000 untuk dimasukkan ke dalam akaun bank defendan. Pada pukul 2 petang hari yang sama, defendan cuba menghubungi plaintif tetapi tidak berjaya. Pada pukul 3.45 petang hari yang sama, defendan menghubungi Cawangan Maybank Jalan Ampang untuk bertanya sama ada wang yang dia serahkan kepada plaintif dimasukkan ke dalam akaun bank defendan seperti yang diarahkan. Pegawai bank

memaklumkan kepada defendan bahawa tiada transaksi telah berlaku berhubungan akaun bank defendan pada hari itu. Defendan, bersama dengan kakak dan abang iparnya, telah ke rumah plaintif untuk mencarinya tetapi diberitahu ibu plaintif bahawa plaintif tiada di rumah. Pada pukul 6.30 petang pada hari yang sama, defendan telah membuat laporan polis terhadap plaintif di ibu pejabat balai polis Ampang Jaya, menyatakan bahawa plaintif telah melarikan diri dengan wang defendan berjumlah RM200,000. Selepas membuat laporan polis tersebut, defendan didatangi beberapa wartawan yang menunggunya di hadapan balai polis. Wartawan-wartawan bertanyakan kepada defendan mengapa dia berada di balai polis dan defendan menyatakan bahawa dia telah membuat laporan polis terhadap plaintif dan membacakan laporan tersebut kepada mereka. Pada 3 Mac 2012, *Harian Metro* menerbitkan sebuah artikel bertajuk "Zahida Rafik Terkedu" iaitu perkara guaman fitnah ini. Kata-kata yang dipertikaikan dalam artikel yang plaintif dakwa mempunyai unsur-unsur fitnah terhadapnya adalah, antara lain (i) bahawa plaintif telah melarikan diri dengan wang berjumlah RM200,000 mengakibatkan defendan mengalami kerugian; (ii) bahawa plaintif tidak dapat dihubungi; (iii) bahawa kes akan disiasat bawah s. 406 Kanun Keseksaan untuk jenayah pecah amanah; dan (iv) bahawa defendan telah membuat kesilapan mempercayai plaintif. Plaintif memplidkan kes bahawa kata-kata yang digunakan dalam makna biasa dan semulajadinya adalah memfitnah dan dimaksudkan, antara lain, bahawa plaintif tidak jujur, seorang pencuri, tidak boleh dipercayai, seorang penjenayah, seorang yang tidak mempunyai reputasi yang baik dan seorang yang tiada moral. Plaintif menghujahkan bahawa kata-kata yang dipertikaikan dalam artikel adalah palsu, tidak berasas dan diterbitkan dengan niat jahat dan ia telah mencemarkan reputasi, karakternya dan juga menjejaskan peluangnya untuk mendapatkan pekerjaan baharu. Defendan membangkitkan pembelaan justifikasi dan perlindungan sampingan. Defendan pula memplidkan kes bahawa dia telah menerima wang sebanyak RM243,000 pada 28 Februari 2012 daripada DW4 sebagai komisyen berhubungan transaksi perniagaan antara mereka. Defendan memplidkan bahawa kata-kata yang dipertikaikan harus menikmati perlindungan sampingan kerana ia adalah regurgitasi laporan polis yang dilindungi oleh perlindungan mutlak. Hakim Mahkamah Tinggi, walau bagaimanapun, berpendapat plaintif telah membuktikan kata-kata yang dipertikaikan dalam artikel adalah memfitnah dan tidak dilindungi oleh perlindungan sampingan. Menurut Hakim Mahkamah Tinggi, defendan gagal membuktikan pembelaan justifikasi dan perlindungan mutlak. Oleh itu, Mahkamah Tinggi membenarkan tuntutan plaintif dan memerintahkan defendan membayar RM150,000 sebagai ganti rugi am dan kos. Oleh itu, rayuan defendan terhadap keputusan tersebut. Defendan menghujahkan bahawa (i) kata-kata yang dipertikaikan bukan memfitnah; (ii) kandungan

laporan polis yang dibuat oleh defendan dilindungi bawah perlindungan mutlak; dan (iii) terdapat keterangan kukuh dan boleh dipercayai bahawa defendan telah mengamanahkan plaintif dengan wang berjumlah RM200,000 untuk dimasukkan ke dalam akaun bank defendan.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Hasnah Mohammed Hashim HMR menyampaikan penghakiman mahkamah:

(1) Adalah matan bahawa untuk membuktikan tort fitnah, beban adalah atas plaintif untuk membuktikan kata-kata yang dipertikaikan mampu menanggung makna fitnah, merujuk pada plaintif dan diterbitkan oleh defendan untuk pihak ketiga. Maksud mesti dihimpunkan daripada kata-kata yang digunakan dalam konteks artikel. Setelah mengkaji kata-kata dalam artikel itu, hakim bicara betul apabila memutuskan bahawa kata-kata dalam maksud biasa dan semulajadi adalah memfitnah dan memperkecilkan plaintif. Kata-kata yang dipertikaikan merujuk pada plaintif dan artikel itu telah diterbitkan oleh *Harian Metro*.

(2) Doktrin perlindungan mutlak melindungi pernyataan dibuat dalam aliran prosiding undang-undang. Oleh itu, tiada tindakan fitnah boleh dibawa terhadap saksi, pihak-pihak. Kata-kata yang dipertikaikan dalam artikel hanya regurgitasi kata-kata dalam laporan polis. Laporan polis telah diterbitkan semula dalam artikel yang dipertikaikan. Hakim bicara terkhilaf apabila memutuskan pembelaan perlindungan mutlak tidak boleh diguna pakai oleh defendan. Penerbitan kandungan yang didakwa memfitnah dalam penerbitan *Harian Metro* menarik pembelaan yang sama dengan cara sampingan seperti yang dilampirkan dengan laporan polis dan dengan itu mahkamah ini berpendapat penerbitan artikel yang dipertikaikan dalam *Harian Metro* menikmati perlindungan mutlak secara sampingan.

(3) Untuk berjaya dalam pembelaan justifikasi, defendan harus membuktikan segala pernyataan material dalam kata-kata yang dipertikaikan adalah benar. Untuk menjustifikasikan pernyataan-pernyataan itu, adalah perlu untuk menunjukkan bahawa pernyataan-pernyataan adalah penetapan atau kesimpulan betul yang diambil daripada fakta terbukti. Defendan telah mengemukakan keterangan berkenaan sumber pendapatannya dan menjelaskan dalam pemeriksaan balas sumber pembayarannya. Pihak yang membuat bayaran kepada defendan dipanggil sebagai saksi. DW4 menghujahkan bahawa dia telah mengeluarkan baucar kepada defendan untuk pembayaran. DW4 mengesahkan bahawa dia telah membuat bayaran tunai RM243,000 kepada defendan. Bapa defendan DW3 memberikan keterangan bahawa dia telah menyaksikan defendan menerima dan mengira jumlah wang

yang besar itu pada 28 Februari 2012. Semasa pemeriksaan balas, plaintif dengan sendirinya mengakui bahawa defendan mempunyai wang lebih daripada RM243,000. Hakim bicara gagal mempertimbangkan kebenaran dan kredibiliti plaintif sebagai saksi, terutama sekali tingkah lakunya selepas dia gagal kembali ke tempat kerja dan kehilangannya sejurus selepas insiden yang didakwa berlaku itu.

(4) Setelah mempertimbangkan keputusan Mahkamah Tinggi secara keseluruhannya dan mengambil kira bahan-bahan dan hujahan-hujahan yang dikemukakan, terdapat kesilapan rayuan yang telah dibuktikan oleh defendan yang boleh menjustifikasikan campur tangan rayuan. Defendan membuktikan atas imbangan kebarangkalian kebenaran pernyataan laporan polis bahawa plaintif telah melarikan diri dengan wang yang diamanahkan oleh defendan untuk dimasukkan ke dalam akaun bank defendan. Keputusan Mahkamah Tinggi dengan itu diketepikan.

Case(s) referred to:

Abdul Manaf Ahmad v. Mohd Kamil Datuk Hj Mohd Kassim [2009] 2 CLJ 121 CA ***(refd)***

Ayob Saud v. TS Sambanthamurthi [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 HC ***(refd)***

Jeyaretnam Joshua Benjamin v. Lee Kuan Yew [1992] 2 SLR 310 ***(refd)***

Lee Yoke Yam v. Chin Keat Seng [2012] 9 CLJ 833 FC ***(refd)***

S Ashok Kandiah & Anor v. Dato' Yalumallai Muthusamy & Anor [2011] 1 CLJ 460 CA ***(refd)***

Sharifuddin Mohamed & Anor v. Dato' Annas Khatib Jaafar & Another Appeal [2016] 3 CLJ 574 CA ***(refd)***

Sutherland And Others v. Stopes [1925] AC 47 ***(refd)***

Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Bhd & Anor [1973] 1 LNS 146 HC ***(refd)***

Tan Sri Dato' Seri Musa Dato' Hj Hassan v. Dato' Seri Anwar Ibrahim [2010] 8 CLJ 239 HC ***(refd)***

Tun Datuk Patinggi Hj Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304 HC ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 107, 112

For the appellant - Muhammad Shafee Abdullah & Wan Aizuddin Wan Mohammed; M/s Shafee & Co

For the respondent - Latheefa Koya & Shahid Adli Kamarudin; M/s Daim & Gamany

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: 23NCVC-95-11-2013 (overruled).]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Hasnah Mohammed Hashim JCA:

[1] The appeal before us was against the decision of the learned High Court Judge in Kuala Lumpur High Court Civil Suit No. S-23(NCVC)-95-11-2013 which on 26 March 2015 allowed the respondent's claim for defamation arising from an article published in *Harian Metro* on 3 March 2012 entitled "Zahida Rafik Terkedu" and awarded general damages in the sum of RM150,000 with costs of RM40,000. The High Court Judge dismissed the defendant's counterclaim. For ease of reference, in this judgment, parties will be referred to as they were in the High Court.

[2] After having heard and considered the submissions of the respective counsel we allowed the appeal and set aside the award for damages. We now give our reasons for doing so.

Material Facts

[3] The defendant is an actress and the plaintiff was her personal driver. On 29 February 2012 the plaintiff went to work as usual at the defendant's house. He was asked by the defendant to count monies which she had just received. The defendant then handed RM200,000 in cash and a cheque for the amount of RM120,000 to the plaintiff to be banked in. Since the defendant's mother was hospitalised at that material time, the defendant was unable to go to the bank. At about 2pm on the same day, the defendant went to the Ampang Puteri Hospital to visit her mother. She tried to contact the plaintiff but was unsuccessful. At about 3.45pm she contacted Maybank Jalan Ampang Branch to enquire whether the monies she had handed over to the plaintiff had been banked in as instructed. The bank officer informed the defendant that there was no transaction made in respect to her bank account that day.

[4] The defendant together with her sister and brother-in-law went to the plaintiff's house to look for the plaintiff. They were told by the plaintiff's mother that he was not at home. At about 6.30pm the same day the defendant lodged a police report against the plaintiff at the Ampang Jaya police headquarters. In the police report she stated as follows:

> Pada 29/02/2012 jam l/kurang 1130hrs saya saperti nama dan alamat di atas Noorazman bin Azmi No KP (7401214-14-6237) No. Tel. (0193731974) pemandu peribadi saya telah melarikan wang tunai sebanyak RM200,000.00. Saya telah menyerahkan wang tersebut kepadanya untuk bank in dalam akaun saya.

[5] After making the police report, the defendant was approached by reporters who were waiting for her outside the police station. The reporters had enquired the reason she went to the police station. She told them she had

lodged a police report against the plaintiff and read the report to them. On 3 March 2012 *Harian Metro* published the article entitled "Zahida Rafik Terkedu" which is the subject matter of the defamation suit.

The Alleged Defamatory Statements

[6] We set out the alleged defamatory statements as published by the *Harian Metro*:

> AMPANG: Pelakon Zahida Mohamed Rafik, 37, kerugian RM200,000 dilarikan pemandu peribadinya selepas diarah memasukkan wang berkenaan ke dalam akaun banknya.
>
> Zahida yang popular menerusi filem komedi "Anak Mami The Movie" menyerahkan wang tunai berkenaan kepada lelaki berusia 37 tahun itu pada kira-kira jam 11 pagi Rabu dan sejak itu suspek gagal dihubungi serta dipercayai sudah melarikan diri.
>
> Pelakon kacukan Melayu-Pakistan itu yang menjalankan perniagaan milik keluarganya di sini turut ke rumah suspek untuk mencarinya, tetapi tidak berhasil apabila dimaklumkan lelaki berkenaan tidak pulang ke rumah dan gagal dihubungi.
>
> Zahida kemudian membuat laporan di Ibu Pejabat Polis Daerah (IPD) Ampang Jaya, di sini, pada petang hari sama.
>
> Ketua Polis Daerah Ampang Jaya, Asisten Komisioner Amiruddin Jamaluddin mengesahkan menerima laporan berkenaan dan kes itu disiasat mengikut Seksyen 406 Kanun Keseksaan kerana pecah amanah.
>
> Sementara itu, Zahida ketika dihubungi semalam berkata, apa yang berlaku mungkin kesilapannya sendiri kerana terlalu percaya terhadap pemandunya itu.
>
> "Saya percayakan sebab dia sudah bekerja dengan saya hampir lima tahun dan sebelum ini tidak pernah melakukan apa-apa kesalahan," katanya.
>
> Zahida berkata wang RM200,000 itu sepatutnya digunakan untuk membuat pembayaran kepada rakan perniagaannya di China.
>
> "Sebelum ini sudah banyak kali dia (suspek) membantu saya dalam urusan memasukkan duit ke dalam akaun bagi urusan kerja, tapi tidaklah jumlah yang besar sebegini. "Kebiasaannya saya akan turut sama pergi dan dia hanya menemani. Namun, kali ini saya benar-benar tidak sempat kerana ibu sakit dan saya agak kelam-kabut di rumah bagi menguruskan beberapa perkara," katanya. Menurut Zahida, dia langsung tidak menjangka pemandunya sanggup menghilangkan diri bersama wang RM200,000 itu.

Sebelum membuat laporan polis, saya ke rumahnya. Maklumlah sudah hampir lima tahun dia bekerja dengan saya, saya kenal anak-anak dan ibunya yang tinggal bersama. Mungkin juga dia ada masalah kewangan atau memerlukan duit, jadi saya ke rumahnya untuk bertanya dan berbincang. Namun ibunya hanya memberitahu dia sudah beberapa hari tidak pulang ke rumah. Jadi, saya tiada pilihan selain melaporkan kepada polis, katanya.

[7] The impugned words in the article that the plaintiff complained are defamatory of him are as follows:

(i) Pelakon Zahida Mohamed Rafik, 37, kerugian RM200,000 dilarikan pemandu peribadinya selepas diarah memasukkan wang ...;

(ii) ... lelaki berusia 37 tahun itu pada kira-kira jam 11 pagi Rabu dan sejak itu suspek gagal dihubungi serta dipercayai sudah melarikan diri.

(iii) … menerima laporan berkenaan dan kes itu disiasat mengikut Seksyen 406 Kanun Keseksaan kerana pecah amanah.

(iv) Sementara itu, Zahida ketika dihubungi semalam berkata, apa yang berlaku mungkin kesilapannya sendiri kerana terlalu percaya terhadap pemandunya itu.

(v) Saya percayakan sebab dia sudah bekerja dengan saya hampir lima tahun dan sebelum ini tidak pernah melakukan apa-apa kesalahan, katanya.

(vi) Zahida berkata wang RM200,000 itu sepatutnya digunakan untuk membuat pembayaran kepada rakan perniagaannya di China.

[8] It is the plaintiff's pleaded case that the words used in their natural and ordinary meaning were defamatory and were meant to mean, amongst others, that the plaintiff:

(i) is dishonest;

(ii) a thief;

(iii) untrustworthy;

(iv) a criminal;

(v) a person who does not have a good reputation; and

(vi) a person with no morals.

[9] The plaintiff contended that the impugned words in the article are false, unfounded and maliciously published. The impugned words had tainted his reputation, character as well as affected his opportunity to get a new job.

[10] The defendant raised the defence of justification and ancillary privilege. It is the defendant's pleaded case that she had received cash of RM243,000 on 28 February 2012 from Shaheful Ardan Adenan (DW4) as commission due to her in respect of a business transaction between them.

[11] The defendant pleaded that the impugned words enjoyed ancillary privilege as it was a regurgitation of the police report which is protected by absolute privilege.

The High Court Decision

[12] The learned High Court Judge was of the considered view that the plaintiff had proven that the impugned words in the article was defamatory and not protected by ancillary privilege. Her Ladyship found that there was no cogent evidence of the material fact that the defendant had entrusted the plaintiff with RM200,000 cash on 29 December 2012 to be banked in. The defendant failed to prove the defence of justification and absolute privilege.

[13] The learned High Court Judge allowed the plaintiff's claim on 26 March 2015 and ordered the defendant to pay RM150,000 as general damages and costs.

The Appeal

[14] The appeal was grounded upon the following grounds:

(i) that the impugned words complained of are not defamatory;

(ii) that the contents of the police report made by the defendant are protected under absolute privilege. The publication of the impugned words was a regurgitation of the police report made by the defendant;

(iii) there is cogent and credible evidence that the defendant had entrusted the plaintiff with the RM200,000 in cash to be banked in;

(iv) there is cogent and credible evidence that the defendant had entrusted the plaintiff with the RM200,000 in cash to be banked in; and

(v) the plaintiff was not entitled to an award of RM15,000 as costs.

The Submission Of The Defendant

[15] Before us, learned counsel for the defendant submitted that based on the evidence adduced the defendant succeeded to prove the defence of justification. The existence of the monies was proven by the defendant. The source of where the monies from is immaterial. The plaintiff had admitted that the defendant is a person of means and capable of having such an amount of money.

[16] It is further submitted that the defendant's actions from the inception of her complaint against the plaintiff absconding with the monies was consistent and corroborated by all the witnesses called for the defence.

[17] Learned counsel argued that the defence of absolute privilege in an ancillary manner is available to the defendant as the article had published the police report that she had lodged.

The Submission Of The Plaintiff

[18] It is the submission of learned counsel for the plaintiff that the impugned words in their natural and ordinary meaning were defamatory and understood to mean that the plaintiff was amongst others, a thief, dishonest. Ancillary privilege would only cover publication incidental to the ordinary course of business. There was no cogent evidence adduced by the defendant to show that it was necessary for her regurgitate the contents of the police report. The defendant had failed to prove the defence of ancillary privilege.

[19] Learned counsel for the plaintiff further submitted that there were various contradictions in the defendant's testimony because there was never RM243,000 in cash given to her. The defendant failed to prove the defence of justification.

[20] The damages awarded was fair and should not be disturbed as the allegation by the defendant had the effect of portraying the plaintiff as thief and untrustworthy.

Decision

[21] It is trite that to establish the tort of defamation, the burden is on the plaintiff to prove that the impugned words:

(i) were capable of bearing the defamatory meaning put forward;

(ii) referred to the plaintiff; and

(iii) published by the defendant to a third person.

(Re: *Ayob Saud v. TS Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 at 324).

Whether The Statements Were Defamatory

[22] The learned trial judge had found that the words complained of in the impugned article are defamatory as they gave rise to importations that the plaintiff had absconded with the monies entrusted to him by the defendant. Mohamed Azmi J (as he then was) in *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Bhd & Anor* [1973] 1 LNS 146; [1973] 2 MLJ 56 at p. 58 said:

> …the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.

[23] Justice Richard Malanjum J (as he was then) in *Tun Datuk Patinggi Haji Abdul Rahman Ya'akub v. Bre Sdn. Bhd. & Ors* [1995] 1 LNS 304; [1996] 1 MLJ 393 said that the correct approach in the construction of the words complained of:

> … is to consider the meaning such words would convey to ordinary reasonable persons using their general knowledge and common sense; it is not confined to strict literal meaning of the words but extends to any reference or implication from which persons can reasonably draw.

[24] In *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew* [1992] 2 SLR 310, LP Thean J, succinctly explained what is natural and ordinary meaning of the word at pp. 318 to 319:

> In determining the natural and ordinary meaning of the words complained of, the sense or meaning intended by the appellant is irrelevant. Nor for such purpose is the sense or meaning in which the words were understood by the respondent relevant. Nor is extrinsic evidence admissible in construing the words. The meaning must be gathered from the words themselves and in the context of the entire speech made by the appellant on that occasion. It is the natural and ordinary meaning as understood by reasonable members of the audience at the Bedok car park on that evening using their general knowledge and common sense. Such meaning is not confined to a literal or strict meaning of the words, but includes any inferences or implications which could reasonably be drawn by such persons: see para 4.04 of *Duncan and Neill on Defamation* (2nd Edn) …

[25] The meaning must be gathered from the actual words used themselves and in the context of the article. Having examined the words used in the article we are of the considered view that the learned judge was correct to have concluded that the words in its natural and ordinary meaning were defamatory and disparaged the plaintiff.

[26] It is an undisputed fact that the impugned words referred to the plaintiff and that the article was published by *Harian Metro*.

The Defence Of Absolute Privilege

[27] The learned High Court Judge erred in holding that the defence of absolute privilege raised by the defendant was devoid of merit bearing in mind that the impugned words in the article were based on the police report made by the defendant. Learned counsel for the defendant submitted that the contents of the police report made by the defendant are protected under absolute privilege.

[28] The doctrine of absolute privilege protects statements made in the course of legal proceedings. No action in defamation could thus be brought against a witness, the parties. Abdul Malik Ishak JCA in the case of *S Ashok Kandiah & Anor v. Dato' Yalumallai Muthusamy & Anor* [2011] 1 CLJ 460 observed:

In short, absolute privilege attaches to statements made in the course of judicial proceedings. Indeed, *Gatley on Libel and Slander*, 11th edn, at p. 382 wrote that:

> No action will lie for defamatory statements, whether oral or written, made in the course of judicial proceedings before a court of justice or a tribunal exercising functions equivalent to those of an established court of justice.

[10] The learned author continued to write at p. 385 in this way:

> The privilege will attach to any matter incidental to the proceedings 'practically necessary for the administration of justice.' That it is convenient is insufficient. However, with the exception of proofs of evidence of witnesses or inquiries in criminal cases, it is not enough that proceedings are contemplated: they must be actually on foot or the matter in issue must be an act which initiates them. In the case of proceedings of regular courts this is not likely to cause any difficulty since the initiation of the proceedings will involve a well-recognised formal step such as the issue of a claim form, but the matter may be more difficult in the case of other tribunals exercising functions of a judicial nature.

[11] It is now settled law that statements made in the course of judicial proceedings or statements contained in documents made in judicial proceedings are absolutely privileged (*Coopers & Lybrand v. Singapore Society of Accountants & Ors* [1988] 1 LNS 60; [1988] 3 MLJ 134 at pp. 136 to 137).

[29] In rejecting the defendant's defence of absolute privilege, the learned High Court Judge had relied on her grounds of judgment in the striking out application that was before her. Her Ladyship concluded that the defendant "... As an actress of no small frame ..." knew that the reporters would publish her statements and there was therefore implied consent to publish the answers to the questions posed by the reporters. The learned High Court Judge found that the defendant failed to give any reasonable excuse that necessitated the regurgitation of the police report and that "… pandering to the press ..." is not an acceptable reasonable excuse. Her Ladyship concluded that the impugned words are not covered by ancillary privilege.

[30] In our opinion, the learned judge had misdirected herself on the law when she concluded that the impugned words in the article are not covered by ancillary privilege. The Federal Court in *Lee Yoke Yam v. Chin Keat Seng* [2012] 9 CLJ 833; [2013] 1 MLJ 145 held that the defence of absolute privilege should be extended to statements made in a police report under s. 107 of the Criminal Procedure Code (CPC) for reasons of public policy was correct and consequently no action for defamation should lie against the person who lodged the police report. The Federal Court agreed with the decision in *Abdul Manaf Ahmad v. Mohd Kamil Datuk Hj Mohd Kassim* [2009]

2 CLJ 121; [2011] 4 MLJ 346 that on public policy consideration, absolute privilege should be extended to statements contained in a police report lodged under s. 107 of the CPC as in the case of a statement made under s. 112 of the CPC:

> … we agree with the decision of the Court of Appeal in *Abdul Manaf Ahmad (supra)* that on public policy consideration, absolute privilege should be extended to a statement contained in a police report lodged under s. 107 of the CPC as in the case of statement made under s. 112 of the CPC. The underlying reason behind this, is the overriding public interest that a member of the public should be encouraged to make police report with regard to any crime that comes to his or her notice. Such a report is important to set the criminal investigation in motion. With such report, the alleged crime may be investigated and the perpetrator be brought to justice. It is without doubt that public interest should override the countervailing consideration that this may sometime lead to an abuse by a malicious informant. In any event, if a false report is lodged by a complainant, he is liable to be prosecuted for making false report under s. 177, s. 182 or s. 203 of the Penal Code. That we believe provides a sufficient safeguard against any person from making a false report.

[31] Justice Prasad Abraham J (as he then was) in the case of *Tan Sri Dato' Seri Musa Dato' Hj Hassan v. Dato' Seri Anwar Ibrahim* [2010] 8 CLJ 239 explained the application of ancillary privilege:

> Ancillary Privilege arises where if it is established at the impugned news conference the defendant regurgitates the contents of the Police report. The privilege is ancillary to the privilege accorded to the Police Report although when at the news conference the press is not privy to the making of the police report itself. For ancillary privilege to apply, is it reasonable the defendant in the position that he was would be subject to scrutiny to by the media and thus repeating the contents of the Police report, would possibly allow the plea of ancillary privilege to arise in a situation where for instance Public interest justifies the publication of the Police Report.

[32] The Court of Appeal in *Sharifuddin Mohamed & Anor v. Dato Annas Khatib Jaafar & Another Appeal* [2016] 3 CLJ 574 was of the view that the ACA report, being an absolutely privileged document, the republication of it in the form of the impugned article also enjoy the protection of ancillary absolute privilege in an ancillary manner.

[33] In this appeal, the evidence adduced plainly shows that the impugned words in the article were in fact nothing more than a regurgitation of the words in the police report. The police report was republished in the impugned article. We agree with the defendant that the learned trial judge had erred when she concluded that that the defence of absolute privilege is not available to the defendant. The publication of the alleged defamatory

contents of the publication in the *Harian Metro* attracts the same privilege in an ancillary manner as that attaching to the police report. We are, therefore of the considered view that the publication of the impugned article in *Harian Metro* would enjoy the protection of absolute privilege in an ancillary manner.

The Defence Of Justification

[34] The defendant's pleaded defence is that she had received cash of RM243,000 on 28 December 2012 from DW4. In a defamation action, the defence of justification is a complete defence if it succeeds. To succeed in the defence of justification, the defendant must establish the truth of all the material statements in the words complained. To justify such comments, it was necessary to show that the statements were the correct imputations or conclusions to be drawn from the proved facts. However, the plea of justification does not fail if the truth of every charge was not proven to be true do not materially injure the plaintiff's reputation.

[35] Lord Finlay in *Sutherland And Others v. Stopes* [1925] AC 47 HL, at pp. 62 to 63 correctly described the defence of justification:

> Such a plea of justification means that the libel is true not only in its allegations of fact but also in any comments made therein … the defendant has to prove not only that the facts are truly stated but also that any comments upon them are correct.

[36] We have perused the article containing the impugned words in detailed and it is our considered view, on plain reading of the words used in the said article, the defendant was regurgitating the police report which she had made.

[37] The defendant had adduced evidence of her source of income and explained in cross-examination her source of payment. The person who made the payment to the defendant was called as witness. DW4 had testified in court that he had issued the voucher (exh. D2) to the defendant for the payment of "bayaran ihsan daripada saya atas semua urusan perniagaan." DW4 confirmed in his evidence that he had made the cash payment of RM243,000 to the defendant. The defendant's father (DW3) gave evidence that he witnessed the defendant receiving and counting the large sum of money on 28 December 2012. Her Ladyship doubted the veracity of DW4 and DW3's evidence citing various discrepancies in their testimony. However, Her Ladyship had forgotten that the burden is always on the plaintiff to prove his case. The learned judge should have asked whether it is plausible for a person in the defendant's position to have cash of RM243,000 on the day in question. During cross-examination, plaintiff, himself readily admitted that the defendant definitely had more money than

RM243,000. No evidence was adduced by the plaintiff to prove that the intention of the defendant filing the police report and making the accusations against him was because he knew of her alleged affair with a Minister. Her Ladyship also failed to consider the veracity and credibility of the plaintiff as a witness, especially his conduct after he failed to return to work and his disappearance immediately after the alleged incident.

Conclusion

[38] Having considered the decision of the learned High Court Judge in its entirety in light of the materials placed before us and the able submissions by both learned counsel, oral as well as written, we are of the respectful view that there is an appealable error that had been shown by the appellant that could properly justify an appellate intervention.

[39] Based on the foregoing reasons, we allowed the appeal with costs of RM50,000 here and below subject to the payment of allocator fee. We set aside all of the orders of the learned trial judge. We also allowed the counterclaim as the defendant has established on the balance of probabilities that the truth of the statement in her police report that the plaintiff had run off the sum of RM243,000 which she entrusted him to bank into her account. The decision of the High Court is set aside. The deposit refunded.